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DAUBERT MOTION TO EXCLUDE OPINION TESTIMONY OF DAVID WILLIAMS

Defendants Duncan Solutions, Inc. (“DSI”) and Duncan Parking Technologies, Inc. (“DPT”), both collectively herein “Defendants,” seek an order from the Court excluding the proffered opinion testimony of Plaintiff’s witness David Williams.

I. BACKGROUND

The present case involves a patent infringement claim by Plaintiff IPS, Inc. (“IPS”) against Defendants, concerning two patents in the field of parking meter technology. In response to Defendants’ invalidity positions concerning obviousness, Plaintiff responded on the merits with a report from its technical expert, Dr. Tajana Rosing, Ph.D., *and in addition* submitted an “expert” report of David Williams which purports to provide opinions regarding secondary indicia of non-obviousness. *See* Declaration of John Giust (“Giust Decl.”), Ex. 1 (Report of David Williams). By this motion, Defendants seeks to exclude the opinions outlined in Williams report concerning secondary indicia of non-obviousness.

Mr. Williams’ only experience with parking meters is his employment by Culver City, where he held the position of parking meter technician, having responsibility for the *repair and maintenance* of parking meters. *See* Giust Decl, Ex. 1, ¶7. Mr. Williams does not have the training, education, background or specialized knowledge to opine on secondary considerations of non-obviousness as to the *industry generally*, including (1) whether there was a long felt need in the public parking industry for the subject meters; (2) the degree to which the meters have enjoyed commercial success in the industry; (3) the degree to which the meters received praise in the public parking industry; (4) the degree to which the meters yielded surprising and unexpected results in the industry; (5) whether others tried and failed to meet the long felt needs in the public parking industry; and (6) whether the art or collective knowledge in the field taught away from the invention or created skepticism about whether the invention would provide a viable solution.

1 See Giust Decl, Ex. 1, ¶2. Indeed Mr. Williams lacks any specialized knowledge
 2 for the parking meter industry in general and also specifically for each of these 6
 3 categories on which he proffers opinions.

4 **II. THE DAUBERT INQUIRY**

5 Rule 702 of the Federal Rules of Evidence provides for the admissibility of
 6 expert testimony in the federal courts, setting the following parameters:

7 If scientific, technical, or other specialized knowledge will assist the
 8 trier of fact to understand the evidence or to determine a fact in issue, a
 9 witness qualified as an expert by knowledge, skill, experience, training,
 10 or education, may testify thereto in the form of an opinion or otherwise,
 11 if (1) the testimony is based upon sufficient facts or data, (2) the
 12 testimony is the product of reliable principles and methods, and (3) the
 13 witness has applied the principles and methods reliably to the facts of
 14 the case.

15 F.R.E 702; *see also Kumho Tire v. Carmichael*, 526 U.S. 137, 149-150
 16 (1999); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 591-595 (1993).
 17 Although Rule 702 affords a court wide latitude to admit expert testimony, such
 18 testimony is inadmissible if it does not meet two related requirements: (1) it must
 19 be based on the special knowledge of the expert; and (2) it must be helpful to the
 20 finder of fact. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 508 U.S. 579,
 21 589-91 (1993); *Andrew v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2d
 22 Cir. 1989)(For an expert's testimony to be admissible ... it must be directed to
 23 matters within the witness' scientific, technical, or specialized knowledge and not
 24 to lay matters which a jury is capable of understanding and deciding without the
 25 expert's help"); *United States v. Jackson*, 425 F.2d 574, 576 (D.C. Cir. 1970) ("To
 26 warrant the use of expert testimony ... two elements are required. First, the subject
 27 of the inference must be so distinctively related to some science, profession,
 28 business or occupation as to be beyond the ken of the average layman, and second,
 the witness must have such skill, knowledge or experience in that field or calling as

1 to make it appear that his opinion or inference will probably aid the trier in his
2 search for truth") (quoting McCormick, Evidence § 13)).

3 The burden is on the party offering the proposed expert opinion testimony to
4 prove by a preponderance of the evidence that the testimony satisfies the
5 requirements for admissibility. *See Daubert*, 509 U.S. at 592 n.10. An expert for
6 one purpose is not an expert for all purposes. "Even where a witness has special
7 knowledge or experience, qualification to testify as an expert also requires that the
8 area of the witness's competence matches the subject matter of the witness's
9 testimony." *See* 29 Charles A. Wright, et al., Federal Practice & Procedure § 6265
10 at p. 255 & nn. 34 & 35 (1977). Here, Mr. Williams' knowledge on repair and
11 maintenance of Culver City parking meters does not match the proffered opinions
12 concerning industry wide practices and the technical area of non-obviousness.

13 **III. MR. WILLIAMS IS NOT AN EXPERT IN THE PARKING** 14 **INDUSTRY.**

15 As stated above, Mr. Williams ultimately seeks to offer opinions on the
16 "public parking industry" and the "collective knowledge in the field." As revealed
17 at his deposition, however, Mr. Williams has no knowledge of the parking industry
18 or the state of collective knowledge in the field, even considering his work
19 maintaining and repairing meters for Culver City.

20 **A. The "Expert Report" of Mr. Williams.**

21 The "expert" report of Mr. Williams, attached as Giust Decl, Exhibit 1
22 hereto, purports to set out a detailed 35 page analysis of the parking meter industry
23 and the benefits of the patented IPS meters, ending with "Appendix A" which
24 supposedly lists the materials reviewed by Mr. Williams. All is not as it seems. At
25 his deposition it was revealed that Mr. Williams spent a *total* of 8 to 10 hours on
26 the report. *See* Giust Decl, Ex. 2, 44: 20-25; 45:14-48:6. Given that Appendix A
27
28

contains over 1,000 pages of documents¹ it would have been humanly impossible to prepare a 35 page report and review the items listed in Appendix A in 8 to 10 hours.² Tellingly, at his deposition, Mr. Williams had no idea what was cited in Appendix A, he could not confirm whether he actually reviewed the documents cited in Appendix A without being provided with each document individually. *See* Giust Decl., Ex 2, at 110:3-113:21; 114:21-115:1-11; 116:11-19; 117-15-118:7. He also refused to answer as to whether or not he typed the expert report (or who “manned the keyboard” and “pushed the buttons”), and refused to identify which attorneys he worked with. *See* Giust Decl., Ex. 2, 41:6-44:19. Moreover he kept no records on how much time he spent on the case. Giust Decl., Ex. 2, 48:24-49:3.

Expert disclosures “... must be accompanied by a written report—*prepared* and signed by the witness.” Fed. R. Civ. P. 26(a)(2)(B) (emphasis added). It is not possible that Mr. Williams or any single retained human witness could have “prepared” this report in 8 to 10 hours, the report makes a mockery of Rule 26. What is evident is that IPS’ counsel wrote the 35 page report, collected exhibits favorable to their side, and contacted Mr. Williams, a friendly witness whose interview appears on IPS’ web site. *See* Giust Decl., Exhibit 3 hereto (“Interview With David Williams...” posted on IPS’ web site). Having a friendly witness sign the document with a minimal review is not what the Federal Rules require.

¹ The third and fourth entries of Appendix A list IPS-DUNC 0002107 through IPS-DUNC 0002327 (221 pages) and IPS-DUNC 0002328-0003139 (812 pages) as document reviewed, which is 1033 pages in total.

² Assuming, generously, that Mr. Williams spent 5 hours meeting with counsel to review the report prepared for him in advance, and 5 hours reviewing documents, he would have had to spend an impossibly short average of 18 seconds per page to review 1,000 documents (There are 18,000 seconds in 5 hours, so the average for 1,000 pages is 18 seconds). However, the list of documents reviewed in Appendix A is *more* than 1,000 pages.

1 Mr. Williams spent an impossibly short 8-10 hours of cursory review on
 2 thousands of pages and signed the report after secretive meetings with unknown
 3 counsel for an unknown time where unknown individuals typed the document.
 4 Had IPS' attorneys actually consulted Mr. Williams on the substance of the report,
 5 they would have learned what was revealed at his deposition- that he has no
 6 knowledge of the parking meter industry nor the opinions contained in the sham
 7 document.

8 **B. Mr. Williams Has No Knowledge of the Parking Meter Industry.**

9 As a parking meter technician, Mr. Williams testified his job was to "repair,
 10 maintain and troubleshoot" parking meters. Ex. 2, 16:4-6. He is only familiar with
 11 the following 7 parking meters from two companies (both parties to this case): the
 12 IPS pay-station, IPS M3, IPS M5, Duncan Pay-station, Duncan mechanical,
 13 Duncan Eagle, and Duncan CK. Giust Decl., Ex. 2, 10:20-11:1. He has seen
 14 others, such as those from POM, but cannot recall the model names and is not
 15 familiar with their operation. Giust Decl., Ex. 2, 11:2:12-1; 38:20-23.

16 Mr. Williams report makes much of the industry associations and meetings
 17 he attended. *See* Giust Decl., Ex. 1, ¶9, ¶11, ¶13. At deposition, Mr. Williams
 18 claimed to have attended over 20 conferences from the California Public Parking
 19 Association (CPPA), but cannot recall the substance of any meeting. *See* Giust
 20 Decl., Ex. 2, 13:14-14:1; 24:16-23. He testified that he attended a smaller number
 21 of International Parking Institute (IPI) conferences and recalls nothing about the
 22 subject matter of the conferences. *See* Giust Decl., Ex. 2, 14:4-18; 24:16-23. He
 23 has not received any certifications from either organization. Giust Decl., Ex. 2,
 24 14:19-21. He cannot recall the names of any board members or presenters from
 25 IPI. Giust Decl., Ex. 2: 15: 3-12. He could not identify any officers or directors
 26 of IPI, even when presented with their images from the IPI web site. Giust Decl.,
 27 Ex. 2, 103: 12-24; Giust Decl., Exhibit 4 (images of IPI officers and directors from
 28 IPI web site). He could not recall the subject matter of any training classes, nor the

1 individuals who presented the training. Giust Decl., Ex. 2, 21:3-22. While he
2 testified that he learned of additional parking meters through IPI, he could not
3 recall which ones. Giust Decl., Ex. 2, 23:4-18. Other than CPPA and IPI, he could
4 not recall any parking meter related conferences. Giust Decl., Ex. 2, 24:12-15.

5 His only certifications are by IPS and Duncan, limited to repair and
6 maintenance of IPS and Duncan meters. *See* Giust Decl., Ex. 2, 19:18-25; 23:19-
7 25; 24:4-8.

8 Mr. Williams was confronted with industry publications cited in his report,
9 and which are attached as Giust Decl., Exhs. 5 and 6 hereto. These publications
10 list the names of companies that are “leading players” (Ex. 5, p. 10) or “key
11 vendors” (Ex. 6, p. 42) in the parking meter industry. But Mr. Williams had not
12 even heard of most listed companies, and he stated he had no knowledge of the
13 operation or functionality of parking meters from the following companies in the
14 industry: Abe McGann, Cale Group, Hecteronic, Metric Group, Parkeon, WPS
15 Parking Solutions. *See* Giust Decl., Ex. 2, 135:1-144:14; *See also* Giust Decl.,
16 Exh. 5, at 10-20. Also Streetline, Deteq Solutions, SP Plus, TransCore. *See* Giust
17 Decl., Ex. 2, 145:1-148:6; *See also* Giust Decl., Exhibit 6 at 42-61.

18 As described above, Mr. Williams was unable to describe any knowledge
19 concerning parking meters within the industry other than those from IPS & DPT
20 which he had personally worked on, and knew nothing about companies in the
21 industry, or the industry itself and its players. Plainly he cannot be qualified as an
22 industry expert. *See Pooshs v. Philip Morris USA, Inc.*, 904 F. Supp. 2d, 1009,
23 1018-1020 (N.D. Ca. 2012) (Dr. Cummings not qualified to testify as to cigarette
24 design despite receiving grant money to support tobacco related research and
25 contributing to numerous papers); *Stockton East Water Dist. v. United States*, 109
26 Fed. Cl. 760, 783 (Fed. Cl. 2013) (note 20) (long-time, experienced employee of
27 plaintiff water district did not have the background to qualify as an expert witness
28 on water usage by a city). The fact that Mr. Williams is familiar with only 7

1 parking meters from just two companies (IPS and DPT), while having no
 2 knowledge anything from a plethora of other players is conclusive evidence that he
 3 lacks knowledge of the wider industry as a whole. "Even where a witness has
 4 special knowledge or experience, qualification to testify as an expert also requires
 5 that the area of the witness's competence matches the subject matter of the
 6 witness's testimony." *See* 29 Charles A. Wright. et al., *Federal Practice &*
 7 *Procedure* § 6265 at p. 255 & nn. 34 & 35 (1977). Here, Mr. Williams' limited
 8 knowledge on repair and maintenance of Culver City parking meters purchased
 9 from two parties to this case does not match the proffered opinions concerning
 10 industry wide practices and the technical area of non-obviousness.

11 Thus Mr. Williams should be precluded from testifying as to the opinions in
 12 the "Background on the Parking Meter Industry" section of his report (Giust Decl.,
 13 Ex. 1, ¶¶30-42) as he lacks the perspective of one in the "industry" for the reasons
 14 stated above. His specific opinions on non-obviousness should be excluded (Giust
 15 Decl., Ex. 1, ¶¶43-89) for the same reasons.

16 **C. Mr. Williams Has No Knowledge of City Procurement of Parking**
 17 **Meters.**

18 The question of why cities buy parking meters of a certain type is plainly
 19 critical to the opinions issued by Mr. Williams, which boil down to the assertion
 20 that the IPS meters offer the benefit of the patented technology and were purchased
 21 for that reason. *See* Giust Decl., Ex 1, ¶44-55 (long felt need); ¶56-66 (commercial
 22 success); ¶67- 75 (industry praise); ¶76-79 (unexpected results); ¶80-82 (failure of
 23 others); ¶83 (teaching away/ skepticism); ¶84-89 (alternatives).

24 Mr. Williams report indicates that he made purchasing decisions with
 25 respect to parking meters (Ex. 1, ¶7), but in deposition he testified that this meant
 26 that he purchased parts within mechanical meters, which is not relevant to this
 27 case. *See* Giust Decl., Ex. 2, 17: 7-23. He testified that he contributed his
 28 knowledge to the city during the process to buy new parking meters, but a "big

1 part” of what he considered was the responsiveness of the manufacturer. *See* Giust
 2 Decl., Ex. 2, 108:13-21. Responsiveness here is unrelated to secondary indicia
 3 and therefore not relevant to the inquiry on obviousness.

4 Even within Culver City, he testified the he had no knowledge of the
 5 procedure for “obtaining information and bids with respect to parking meter
 6 systems.” Giust Decl., Ex. 2, 28:20-29:4. And he has no knowledge of the
 7 procedures used by any other city. Giust Decl., Ex. 12, 30:13-18. And no
 8 knowledge of specifications for parking meters desired by other cities or other
 9 entities such as airports. Giust Decl., Ex. 2, 59:14-24; 60:18-61:4.

10 Thus, Mr. Williams has no expertise in how or why cities around the country
 11 acquired the parking meters that they now have, since he knows nothing about the
 12 acquisition process in any city other than Culver City.

13 **D. Mr. Williams Has No Knowledge of Parking Meter Needs of**
 14 **Cities Generally.**

15 While Mr. Williams had some responsibility with respect to repairing and
 16 maintaining parking meters in Culver City, he has no experience with any other
 17 entities or companies. Giust Decl., Ex. 2, 12:6-15. And he testified he had no
 18 other jobs with respect to parking meters. Giust Decl., Ex 2, 25:12-14. While he is
 19 somewhat familiar with the RFP process in Culver City he has no knowledge of
 20 any RFP process in any other city. *See* Giust Decl., Ex 2, 12:17-24.

21 His expert report refers to his opinions regarding “cities” and
 22 “Municipalities” throughout, but it was discovered at his deposition that these
 23 terms were limited to a small subset of cities nearby Culver City, such as Los
 24 Angeles, Long Beach, Santa Monica, Las Vegas, Manhattan Beach, and Monterey.
 25 *See* Giust Decl., Ex. 2: 66:21-67:13; 68:1-69:12; 76:11-20; 126:6-13. And
 26 moreover, he testified that cities have different needs, “all cities’ needs are based
 27 on that city” and “all cities have their own specifications as to what they are
 28 looking for.” Giust Decl., Ex. 2, 130:19-131:13; 134:1-19.

1 Mr. Williams' opinions on why "cities" or "Municipalities" in general do
2 something with respect to parking meters are not founded on any expertise or
3 knowledge that he may possess as he admitted to lacking such knowledge.

4 Even within Culver City, he had only limited knowledge of the pricing of
5 parking meters, extending to repair/replacement cost and no knowledge of the total
6 price. Giust Decl., Ex. 2, 88:20-90:20. He had no knowledge of profits. Giust
7 Decl., Ex. 2, 93:3-9.

8 **E. Mr. Williams Admits That He Is Not A Person of Ordinary Skill**
9 **In The Art.**

10 IPS' technical expert, Dr. Tajana Rosing, opines that "a person of ordinary
11 skill in the art would have at least a bachelor's degree in electrical engineering, or
12 the equivalent, and at least 3-5 years of experience designing or manufacturing
13 electronic devices that operate off batteries and/or solar panels." Giust Decl., Ex.
14 7, at ¶40 (Rosing Report). Defendants' expert, Dr. Joshua Phinney, opines that
15 person of ordinary skill in the art at the time of the alleged invention "would have a
16 bachelor's degree in an engineering field (mechanical engineer, electrical
17 engineering, or industrial engineering), and one to two years of experience in the
18 design or manufacturing of parking meters, or the equivalent. See Ex. 8, at ¶17
19 (Phinney Report).

20 Mr. Williams lacks this level of expertise. He does not have a bachelor's
21 degree and he did not graduate from college where he majored in Administrative
22 Justice. Giust Decl., Ex. 2, 26:18-27:3. This major makes sense given his work
23 experience as a police officer. Giust Decl., Ex. 1, ¶14. He stated that he does not
24 have the equivalent of a bachelor's degree in engineering through work experience.
25 Giust Decl., Ex. 2, 148:14-18 ("Q: Do you have the equivalent of a bachelor's
26 degree in engineering through your work experience? THE WITNESS: No."
27 objection omitted). Thus he fails the first part of both expert's criteria for a person
28 of ordinary skill.

1 He admitted that he has not designed electronic devices that operate off
2 batteries or solar panels, failing Dr. Rosing's second criteria for a person of
3 ordinary skill. Giust Decl., Ex. 2, 148:20-25 ("Q: And you've not designed
4 electronic devices that operate off batteries or solar panels; is that right? THE
5 WITNESS: No." objection omitted). He admitted that he cannot design a parking
6 meter, failing Dr. Phinney's second criteria for a person of ordinary skill. Giust
7 Decl., Ex. 2, 28:3-5 ("Q. Well, let's say do you know how to design a parking
8 meter? A. No.").

9 Mr. Williams has never had any training or coursework in engineering or the
10 design of electronic systems. See Giust Decl., Ex. 2:13-23. Mr. Williams has
11 never consulted on parking meters, or authored any relevant publications, or
12 published anything beyond his work at Culver City. See Giust Decl., Ex. 2, 65:7-
13 25; 66:7-20.

14 Obviousness and non-obviousness are assessed as to the level of ordinary
15 skill in the art, as stated in *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

16 Under § 103, the scope and content of the prior art are to be
17 determined; differences between the prior art and the claims at issue are
18 to be ascertained; and the level of ordinary skill in the pertinent art
19 resolved. Against this background, the obviousness or non-
20 obviousness of the subject matter is determined. Such secondary
21 considerations as commercial success, long felt but unresolved needs,
22 failure of others, etc., might be utilized to give light to the
23 circumstances surrounding the origin of the subject matter sought to be
24 patented. As indicia of obviousness or non-obviousness, these
25 inquiries may have relevancy. *Id.* at 17-18.

26 As Mr. Williams lacks ordinary skill in the art, he cannot assesses the
27 obviousness or non-obviousness of the claims under *Graham*. Moreover, one
28 must "look with care at a patent application that claims as innovation the

1 combination of two known devices according to their established functions”
 2 *KSR Int’l v. Teleflex, Inc.*, 127 S. Ct. 1727, 1741 (U.S. 2007). And “[I]t can be
 3 important to identify a reason that would have prompted a person of ordinary skill
 4 in the relevant field to combine the elements in the way that the claimed new
 5 invention does.” *Id.* Mr. Williams cannot be cross examined on what elements a
 6 person of ordinary skill in the art would have been prompted to combine (or even
 7 would have known), as he lacks the knowledge a person of ordinary skill would
 8 possess. Permitting his opinions on secondary indicia of non-obviousness is highly
 9 prejudicial as he cannot be cross examined using the baseline knowledge of a
 10 person of ordinary skill to probe his opinions and conclusions.

11 **F. Mr. Williams Methodology is Suspect.**

12 Having no relevant background and no specialized knowledge of the parking
 13 meter needs of the industry or of cities generally, Mr. Williams’ methodology for
 14 his “opinions” follow a simple format that this Court should reject: provide an
 15 unsupported conclusion based on his “experience” and follow it up with a partisan
 16 summary of cherry picked documents produced by IPS’ counsel that favor IPS.
 17 *See* Giust Decl., Ex 1, ¶44-55 (long felt need); ¶56-66 (commercial success); ¶67-
 18 75 (industry praise); ¶76-79 (unexpected results); ¶80-82 (failure of others); ¶83
 19 (teaching away/ skepticism); ¶84-89 (alternatives). In *Pooshs*, the Plaintiff’s
 20 expert Dr. Cummings did the same thing to no avail.

21 Defendants also assert that his methodology in this regard is not sound, as it
 22 consists solely of reviewing various documents that he himself selected, and
 23 producing a summary of those documents. Defendants contend that such
 24 testimony would not assist the jury, and that it is not sufficiently reliable to
 25 satisfy the requirements of *Daubert*.

26 *Pooshs*, 904 F.Supp. 2d 1009, at 1018.

27 In *Pooshs*, Dr. Cummings was prevented from providing opinions on
 28 cigarette design even though he had a vast amount of experience with tobacco. As

1 in *Pooshs*, this Court should preclude Mr. Williams from providing opinions as to
 2 the parking meter industry because his experience is also in a different field- repair
 3 and maintenance of parking meters, and because his methodology is unsound. His
 4 actual role is that of a mere conduit to summarize data favorable to IPS. This is
 5 contrary to Supreme Court precedent. “[N]othing in either *Daubert* or the Federal
 6 Rules of Evidence requires a district court to admit opinion evidence which is
 7 connected to existing data only by the ipse dixit of the expert.” *G.E., Inc. v. Joiner*,
 8 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

9
 10 **IV. CONCLUSION.**

11 For the reasons stated herein, IPS has not met its burden to prove by a
 12 preponderance of the evidence that Mr. Williams opinion testimony on the parking
 13 meter industry and/or its collective knowledge satisfies the requirements for
 14 admissibility. *See Daubert*, 509 U.S. at 592 n. 10. The Court should exclude the
 15 testimony of Mr. Williams directed to the parking meter industry and to collective
 16 knowledge in the field (those opinions of Giust Ex. 1, ¶¶30-89).

17
 18 Date: August 8, 2017

WHGC, P.L.C.

19
 20 /s/ John E. Giust

21 John E. Giust.

22 *Attorneys for Duncan Parking*
 23 *Technologies, Inc.*
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed with the Court's CM/ECF system which will provide notice on all counsel deemed to have consented to electronic service. All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing document by mail on this day.

Dated: August 8, 2017

Respectfully submitted,

By: /s/ John E. Giust

John E. Giust

Attorneys for Duncan Parking Technologies, Inc.